Finnex Capital Sdn Bhd v Pusat Dialisis Nur Kasih Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-906–12 OF 2023
ONG CHEE KWAN J
14 JULY 2025

Moneylenders — Moneylending agreement — Enforceability of — Plaintiff granted loan to defendant pursuant to moneylending agreement — Parties entered into separate oral agreements with different payment terms from initial moneylending agreement — Defendant defaulted in payment of loan — Plaintiff filed action against defendant to recover outstanding loan — Whether plaintiff charged interest above permitted rate of 18%pa (1.5% per month) under s 17A(1) of the Moneylenders Act 1951 and therefore rendering moneylending agreement void and unenforceable — Whether s 27A of the Moneylenders Act 1951 which prohibited employment of agent by moneylender had been contravened — Contracts Act 1950 ss 2(g) & 24 — Moneylenders Act 1951 ss 17A(1) & 27A

This was a claim by the plaintiff, a licensed moneylender under the Moneylenders Act 1951 ('Act 400'), for recovery of an outstanding loan from the defendant. The defendant at the material time was actively seeking for loans to cover the working capital of its dialysis centre. With the help of one Gallen Lee of FG Capital Sdn Bhd ('FG Capital'), the defendant was introduced to the plaintiff. The plaintiff and the defendant then entered into a loan agreement dated 6 May 2022 ('the loan agreement') in which the plaintiff granted a loan of RM3.5m for a tenure of six months with the interest rate of 18%pa. However, when the loan was credited into the defendant's account, the defendant had only received RM3,278,300 and the rest of the loan amount was utilised by the plaintiff for the first interest instalment, lawyer's fees as well as the payment of processing fee for the fund arrangement to FG Capital. Aside from the loan agreement, there were also two oral agreements between the parties. Under the first oral agreement, the defendant was required to pay interest in the sum of RM122,500 per month for six months as well as RM3.5m bullet payment of the principal sum at the end of the six months. Subsequently, due to the inability of the defendant to make the relevant payments under the first oral agreement, the plaintiff agreed to extend the time of repayment of the loan together with a reduction of the interest rate ('the second oral agreement'). Under the second oral agreement, the defendant was required to pay interest in the sum of RM70,000 per month for four months as well as RM3.5m bullet payment of the principal sum at the end of the four months. It ought to be noted that the defendant had issued post-dated cheques in favour of the plaintiff for its payment responsibilities under both oral agreements. When the defendant defaulted in payment of the loan, the

plaintiff brought the present action to claim the amount of RM3,213,000 being the unpaid principal sum, plus RM292,100.67 in late payment interest at 8%pa. The defendant on the other hand counterclaimed for: (a) declaration that the loan agreement was void ab initio, and unenforceable; (b) aggravated damages and exemplary damages for breaching the money lending agreement and Act 400; and (c) damages amounting to RM8,236,250 for loss of income, operational cost and expenditure for the defendant's business. The issues that arose in the present case were: (i) whether the plaintiff had charged interest above the permitted rate of 18%pa (1.5% per month) under s 17A(1) of Act 400 and therefore rendering the moneylending agreement void and unenforceable; and (ii) whether s 27A of Act 400 which prohibited the employment of an agent by a moneylender had been contravened.

Held, dismissing the plaintiff's action and the defendant's counterclaim with costs of RM85,000 (subject to allocator) to be paid by the plaintiff to the defendant:

(1) Under s 17A(1) of Act 400, the prescribed interest rate for unsecured loan was 18%pa or 1.5% per month. Pursuant to ss 2(g) and 24 of the Contracts Act 1950, any contravention of s 17A(1) of Act 400 would render the loan agreement illegal, void ab initio and unenforceable (see paras 26–27).

(2) The court opined that the figure of RM52,500 in the plaintiff's ledger account that was treated as the monthly interest payment was to paint a picture that the rate of interest charged was 18%pa in compliance with the provisions of Act 400. In truth, the position between the parties was that the monthly interest payments under the first oral agreement and the second oral agreement were RM122,500 and RM70,000 respectively. There was no repayment of the principal sum at all. Further, notwithstanding that the ledger account showed a reduction in the outstanding principal loan sum, the truth was the entire principal loan sum of RM3.5m was to be paid in one bullet payment. Based on the aforesaid, the rate of interest charged by the plaintiff in respect of the loan sum of RM3.5m were at 42%pa and at 24%pa, respectively which contravened s 17A(1) of Act 400. Therefore, the court ruled that the loan agreement entered into between the plaintiff and the defendant was in fact based on the first oral agreement and the second oral agreement and were void and unenforceable being in contravention of s 17A(1) of Act 400 (see paras 28, 36, 40–42 & 44).

(3) Based on the evidence, the amounts to be paid to FG Capital were determined not by the defendant but by the plaintiff. Crucially, the sum of RM33,250 that FG Capital would deduct from its 'service charges' each month to pay the plaintiff purportedly toward capital repayment of the loan was also an arrangement that was made privately only between

the plaintiff and Gallen Lee and/or FG Capital without the defendant's knowledge at all. The aforesaid showed that Gallen Lee and or FG Capital was at all times acting as 'agent or canvasser' for the plaintiff and or at the very least had received directly or indirectly valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to the plaintiff the defendant to borrow money. The above facts clearly showed that Gallen Lee had been canvassing the plaintiff's business to borrowers who were looking for loan and this was in clear contravention of s 27A(1) of Act 400 and therefore rendering the loan agreement, be it under the loan agreement dated 6 May 2022, the first oral agreement and or the second oral agreement to be void and unenforceable against the defendant (see paras 49–51 & 53).

(4) In relation to the defendant's counterclaim, following the court's findings that the plaintiff had contravened ss 17A(1) and 27A of Act 400 with the consequence of the loan agreement, the first oral agreement and the second oral agreement being rendered void and unenforceable, the declaration sought by the defendant was unnecessary (see para 56).

(5) With regards to the defendant's claims for damages, be it general damages or aggravated or exemplary damages, the burden was on the defendant to prove the same. In this regard, the court found that the defendant had failed to satisfy the court on the issue of causation. No one from the relevant financial institutions was called to testify that the defendant's purported failure to obtain or to withdraw financing facilities from the said financial institutions was due to the blacklisting of the defendant by CTOS. Neither was the claim for the loss amounting to RM8,236,250 for purportedly for loss of income, operational cost and expenditure for the defendant's business proven before the court (see paras 57–59).

[Bahasa Malaysia summary

Ini merupakan tuntutan oleh plaintif, pemberi pinjaman wang berlesen di bawah Akta Pemberi Pinjam Wang 1951 ('Akta 400'), untuk mendapatkan semula pinjaman tertunggak daripada defendan. Defendan pada masa yang material sedang giat mencari pinjaman untuk menampung modal kerja pusat dialisisnya. Dengan bantuan Gallen Lee dari FG Capital Sdn Bhd ('FG Capital'), defendan diperkenalkan kepada plaintif. Plaintif dan defendan kemudiannya memeterai perjanjian pinjaman bertarikh 6 Mei 2022 ('perjanjian pinjaman tersebut') di mana plaintif memberikan pinjaman sebanyak RM3.5 juta untuk tempoh enam bulan dengan kadar faedah 18% setahun. Walau bagaimanapun, apabila pinjaman tersebut dikreditkan ke dalam akaun defendan, defendan hanya menerima RM3,278,300 dan baki jumlah pinjaman tersebut telah digunakan oleh plaintif untuk ansuran faedah pertama, yuran peguam serta pembayaran yuran pemprosesan kepada FG Capital untuk pengaturan dana tersebut. Selain daripada perjanjian pinjaman tersebut, terdapat juga dua perjanjian lisan antara pihak-pihak. Di bawah

perjanjian lisan pertama, defendan dikehendaki membayar faedah berjumlah RM122,500 sebulan selama enam bulan serta pembayaran keseluruhan RM3.5 juta jumlah prinsipal pada akhir tempoh enam bulan tersebut. Seterusnya, disebabkan oleh ketidakupayaan defendan untuk membuat pembayaran yang berkaitan di bawah perjanjian lisan pertama, plaintif bersetuju untuk melanjutkan masa pembayaran balik pinjaman dan bersetuju untuk mengurangkan kadar faedah ('perjanjian lisan kedua'). Di bawah perjanjian lisan kedua, defendan dikehendaki membayar faedah sejumlah RM70,000 sebulan selama empat bulan serta pembayaran keseluruhan RM3.5 juta jumlah prinsipal pada akhir tempoh empat bulan tersebut. Perlu diingatkan bahawa defendan telah mengeluarkan cek-cek tarikh hadapan bagi pihak plaintif untuk tanggungjawab pembayarannya di bawah kedua-dua perjanjian lisan tersebut. Apabila defendan ingkar dalam pembayaran pinjaman tersebut, plaintif membawa tindakan semasa untuk menuntut jumlah RM3,213,000 sebagai jumlah prinsipal yang belum dibayar, ditambah RM292,100.67 bagi faedah pembayaran lewat pada kadar 8% setahun. Defendan pula telah menuntut balas untuk: (a) pengisytiharan bahawa perjanjian pinjaman tersebut terbatal secara ab initio, dan tidak boleh dikuatkuasakan; (b) ganti rugi teruk dan ganti rugi teladan atas pelanggaran perjanjian pinjaman wang tersebut dan Akta 400; dan (c) ganti rugi berjumlah RM8,236,250 untuk kehilangan pendapatan, kos operasi dan perbelanjaan untuk perniagaan defendan. Isu-isu yang timbul dalam kes semasa ialah: (i) sama ada plaintif telah mengenakan faedah melebihi kadar yang dibenarkan iaitu 18% setahun (1.5% sebulan) di bawah s 17A(1) Akta 400 dan oleh itu menjadikan perjanjian pinjaman wang tersebut terbatal dan tidak boleh dikuatkuasakan; dan (ii) sama ada s 27A Akta 400 yang melarang pengambilan ejen oleh pemberi pinjaman wang telah dilanggar.

Diputuskan, menolak tindakan plaintif dan tuntutan balas defendan dengan kos sebanyak RM85,000 (tertakluk kepada alokator) yang perlu dibayar oleh plaintif kepada defendan:

(1) Di bawah s 17A(1) Akta 400, kadar faedah yang ditetapkan untuk pinjaman tanpa cagaran adalah 18% setahun atau 1.5% sebulan. Menurut ss 2(g) dan 24 Akta Kontrak 1950, apa-apa pelanggaran s 17A(1) Akta 400 akan menjadikan perjanjian pinjaman tersebut tidak sah, terbatal ab initio dan tidak boleh dikuatkuasakan (lihat perenggan 26–27).

(2) Mahkamah berpendapat bahawa angka RM52,500 dalam akaun lejar plaintif yang dianggap sebagai bayaran faedah bulanan adalah untuk menggambarkan bahawa kadar faedah yang dikenakan adalah 18% setahun selaras dengan peruntukan Akta 400. Namun hakikatnya, kedudukan antara pihak-pihak adalah bahawa bayaran faedah bulanan di bawah perjanjian lisan pertama dan perjanjian lisan kedua masing-masing adalah RM122,500 dan RM70,000. Tiada pembayaran

balik jumlah prinsipal langsung. Tambahan pula, walaupun akaun lejar tersebut menunjukkan pengurangan dalam jumlah pinjaman prinsipal tertunggak, sebenarnya jumlah pinjaman prinsipal keseluruhan sebanyak RM3.5 juta perlu dibayar dalam satu pembayaran sekaligus. Berdasarkan dapatan di atas, kadar faedah yang dikenakan oleh plaintif ke atas jumlah pinjaman sebanyak RM3.5 juta adalah masing-masing pada kadar 42% setahun dan 24% setahun, yang melanggar s 17A(1) Akta 400. Oleh itu, mahkamah memutuskan bahawa perjanjian pinjaman yang dimeterai antara plaintif dan defendan sebenarnya berdasarkan perjanjian lisan pertama dan perjanjian lisan kedua tersebut dan perjanjian tersebut adalah terbatal dan tidak boleh dikuatkuasakan kerana melanggar s 17A(1) Akta 400 (lihat perenggan 28, 36, 40–42 & 44).

(3) Berdasarkan keterangan, jumlah yang perlu dibayar kepada FG Capital bukan ditentukan oleh defendan tetapi oleh plaintif. Yang penting, jumlah RM33,250 yang akan ditolak oleh FG Capital daripada 'service charges' setiap bulan untuk membayar plaintif yang kononnya untuk pembayaran balik modal pinjaman juga merupakan pengaturan yang dibuat secara tertutup hanya antara plaintif dan Gallen Lee dan/atau FG Capital tanpa pengetahuan defendan sama sekali. Perkara tersebut menunjukkan bahawa Gallen Lee dan/atau FG Capital sentiasa bertindak sebagai 'agent or canvasser' untuk plaintif dan/atau sekurang-kurangnya telah menerima balasan berharga secara langsung atau tidak langsung melalui komisen atau sebaliknya kerana memperkenalkan atau berjanji untuk memperkenalkan defendan kepada plaintif untuk meminjam wang. Fakta-fakta di atas jelas menunjukkan bahawa Gallen Lee telah 'canvassing' perniagaan plaintif kepada peminjam yang sedang mencari pinjaman dan ini jelas melanggar s 27A(1) Akta 400 dan oleh itu menjadikan perjanjian pinjaman tersebut, sama ada di bawah perjanjian pinjaman bertarikh 6 Mei 2022, perjanjian lisan pertama dan/atau perjanjian lisan kedua terbatal dan tidak boleh dikuatkuasakan terhadap defendan (lihat perenggan 49–51 & 53).

(4) Berhubung dengan tuntutan balas defendan, susulan dapatan mahkamah bahawa plaintif telah melanggar ss 17A(1) dan 27A Akta 400 dengan akibat perjanjian pinjaman tersebut, perjanjian lisan pertama dan perjanjian lisan kedua menjadi terbatal dan tidak boleh dikuatkuasakan, pengisytiharan yang dipohon oleh defendan adalah tidak perlu (lihat perenggan 56).

(5) Berkenaan tuntutan defendan untuk ganti rugi, sama ada ganti rugi am atau ganti rugi teruk atau teladan, beban terletak pada defendan untuk membuktikannya. Dalam hal ini, mahkamah mendapati bahawa defendan telah gagal memuaskan hati mahkamah mengenai isu sebab-akibat. Tiada sesiapa pun daripada institusi-institusi kewangan

berkaitan yang dipanggil untuk memberi keterangan bahawa kegagalan defendan untuk mendapatkan atau mengeluarkan kemudahan pembiayaan daripada institusi-institusi kewangan tersebut adalah disebabkan oleh penyenaraian hitam defendan oleh CTOS. Tuntutan untuk kerugian berjumlah RM8,236,250 yang didakwa atas kehilangan pendapatan, kos operasi dan perbelanjaan untuk perniagaan defendan juga tidak dibuktikan di hadapan mahkamah (lihat perenggan 57–59).]

Cases referred to

Mahmood bin Ooyub v Li Chee Loong and another appeal [2020] 6 MLJ 755, CA (refd)

Triple Zest Trading & Suppliers & Ors v Applied Business Technologies Sdn Bhd [2023] 6 MLJ 818, FC (refd)

Legislation referred to

Contracts Act 1950 ss 2(g), 24

Moneylenders Act 1951 ss 17A(1), 27A, 27A(1)

Teoh Bi Shan (with Chiam Fui Ting and Nurul Syahira Najwa bt Mohd Rosli) (Bishan & Partners) for the plaintiff.

Satvinder Singh a/l Hardial Singh (with Roshvinder Singh a/l Harbindar Singh) (Khalil Surinder & Assoc) for the defendant.

Ong Chee Kwan J:

INTRODUCTION

[1] This case presents a familiar yet troubling scenario in the realm of moneylending. It is a claim for recovery of an outstanding loan that on closer scrutiny unravels under the weight of statutory non-compliance and accounting artifice. The plaintiff, a registered moneylender seeks judgment for the balance due under a loan advanced to the defendant. However, what initially appears to be a straightforward claim for debt recovery is complicated by the plaintiff's oral agreement with the defendant and the plaintiff's conduct imposing interest far exceeding the statutory limits prescribed under the Moneylenders Act 1951 ('the MLA') and the manner in which the loan was documented and accounted for was designed to conceal the true cost of borrowing.

[2] The claim was for the non-payment of a RM3.5m loan advanced by the plaintiff. The plaintiff claims that the defendant had repaid only RM287,000 towards principal and RM577,500 as interest. The plaintiff now seeks recovery of the remaining RM3,213,000 principal, plus RM292,100.67 in late payment interest at 8%pa from 15 March 2023 to 22 October 2023.

[3] The defendant challenges the enforceability of the moneylending agreement on grounds of statutory illegality under the MLA notwithstanding that the plaintiff is a licensed moneylender. The defendant contends that the loan carried excessive and unlawful interest rates, and that the plaintiff employed an agent who had received valuable consideration for procuring the loan agreement in contravention of the provisions in the MLA. The aforesaid renders the loan agreement void and unenforceable.

[4] The defendant also seeks compensation for losses and hardship suffered due to the plaintiff's writ action premised on an illegal money-lending transaction.

[5] As will be seen, the law does not assist a party who, in seeking to enforce a contract, relies on a structure that masks illegality under the guise of compliance.

BACKGROUND FACTS

[6] The defendant was introduced to the plaintiff by one Gallen Lee of FG Capital Sdn Bhd ('FG Capital'). It is not disputed that at the material time, the defendant was actively seeking for loans from various financial institutions for purposes of a working capital for its dialysis centers. Gallen Lee then arranged a meeting between DW1 and PW1 for purposes of obtaining credit facility from the plaintiff.

[7] Prior to that meeting, on 28 April 2022, Gallen Lee informed DW1 via WhatsApp that the plaintiff was agreeable to provide a loan of RM3.5m with a 3% processing fee and a monthly interest of 3.5% for a tenure of six months, with an option to settle the loan earlier after three months.

[8] On 6 May 2022, Gallen Lee facilitated a meeting between PW1 and DW1 at the plaintiff's office at OUG Parklane Biz Park, during which time the defendant signed the moneylending agreement ('the loan agreement dated 6 May 2022').

[9] In the loan agreement dated 6 May 2022, the terms that were purportedly agreed upon were as follows:

(a)	Loan amount	: RM3,500,000
(b)	Interest rate	: 18%
(c)	Repayment date and duration of the loan repayment	: First payment to be made on 15 May 2022 and thereafter 15th day of each and every month for six months
(d)	Installment amount	: RM635,833.33

[10] However, at the trial, PW1 admitted that there was a separate oral agreement between plaintiff and defendant with totally different terms, namely, the defendant would pay only the interest on the loan for six months and there would be a bullet repayment of the loan sum thereafter ('the first oral agreement'). The aforesaid is borne out by PW1's testimony:

> R.SINGH: Now, my question to you. Did the Plaintiff collect from the Defendant the installment payment of RM635,833.33 as reflected in the agreement?
>
> PW1: No.
>
> R.SINGH: Why not?
>
> PW1: *There was an agreement okay, that they will pay the six months interest installment. And a bullet repayment on the last final month.*
>
> R.SINGH: So, that is the separate payment that was made?
>
> PW1: *There was separate arrangement between parties.*

[11] Accordingly, in truth via the first oral agreement, the plaintiff agreed and imposed onto the defendant to service six months interest payment and one bullet payment to repay the loan, the terms were as follows:

(a)	Interest payment	: RM122,500 at 3.5% of the loan amount per month
(b)	Duration	: six months
(c)	Capital payment	: RM3.5m (bullet payment) at the end of the six months

[12] In accordance with the first oral agreement, the defendant was instructed to deposit five post-dated cheques of RM122,500 each with the plaintiff's solicitors, M/s Bishan & Partners being the monthly interest payments, and one post-dated cheque for RM3.5m for capital re-payment. The defendant complied.

[13] Further, as a pre-condition for the loan, DW1 was told to hand over blank letterheads to the plaintiff to enable them to prepare two undated letters of instructions and appointment for the directors of the defendant to sign ('the letter of authorisation and letter of appointment'). The letters, inter alia, were for the appointment of the plaintiff's solicitors, Messrs Bishan & Partners as stakeholders to pay the various payments as agreed vide the first oral agreement.

[14] On 13 May 2022, the loan was credited into the defendant's bank account. However, only RM3,278,300 was credited and the following deductions were made from the RM3.5m loan amount:

(a) RM122,500 to be released to M/s Bishan & Partners as payment for the first interest installment;

A (b) RM29,200 to be released to M/s Bishan & Partners for payment of professional charges and disbursements for service given; and

(c) RM70,000 to be released to FG Capital being the payment of processing fee for the fund arrangement.

B

[15] The defendant served the interest payment of RM122,500 (3.5%) diligently for the first six months from 13 May 2022 to 14 November 2022 (ie, the deduction from drawdown of loan and the five post-dated cheques).

C **[16]** However, due to the exorbitant interest rate of 3.5% per month charged by the plaintiff, the defendant was facing difficulties to continue paying the said interest and could not also honor the bullet payment of RM3.5m at the end of the term.

D **[17]** Therefore, somewhere around November 2022, the defendant requested for an extension of time to repay the loan and reduction of the interest rate, to which the plaintiff granted based on the following terms:

(a)	Extension period	: four months
E (b)	Interest payment	: RM70,000 at 2% of the loan amount per month
(c)	Capital payment	: RM3.5m (bullet payment) at the end of the four months

F **[18]** The defendant was again told to deposit the interest payment of RM70,000 per month for four months through post-dated cheques and a bullet payment post-dated cheque of RM3.5m ('the second oral agreement').

[19] The defendant again paid the interest charged diligently under the G second oral agreement for the next four months from 15 December 2022 to 15 March 2023. However, the exorbitant interest charged were already taking a toll on the defendant and the defendant could no longer service the interest payment of RM70,000 (2% per month) and begun defaulting on the interest payments.

H

[20] The plaintiff never disputed receiving the five post-dated cheques of RM122,500 and one bullet payment of RM3.5m and in fact, the PW1 was also aware that the defendant had deposited those cheques to the plaintiff's solicitors.

I

[21] Further, during cross-examination, PW1 also agreed and accepted that they had collected the further four post-dated cheques from December 2022 to March 2023 for the sum of RM70,000 each, being the interest payment and one bullet payment of RM3.5m as capital repayment.

S.SINGH: Yes. With this deduction, the Defendant deposited with the Plaintiff, the cheques that at page 109 Bundle B, Mr. Ch'ng. Bundle B Yang Arif, page 109.

PW1: Okay, I'm there.

S.SINGH: So the cheques are *made up of four cheques, 70,000 each*, they are dated here 15,12.2022 at page 109, we have 15 January same amount 70,000, 15 February same amount 70,000, and at page 110, 15 March 70,000. And together with this, once again, a bullet payment cheque which is dated 15.3.2023 for 3.5 million. Correct?

PW1: Correct.

S.SINGH: Yes. And all this cheques this time, was not being held by Bishan & Partners as stakeholder in fact it *was deposited directly with the Plaintiff, correct?*

PW1: *Correct.*

[22] On March 2023 onwards, DW1 had engaged in a series of conversation with PW1, whereby the DW1 had requested for extension of the loan period. The plaintiff granted the extension with the same terms whereby the defendant had to deposit postdated cheques of RM70,000 from April 2023 onwards. During the extension, the defendant made part payment of the 2% interest for 15 April 2023 on 20 April 2023 in the sum of RM28,000, on 22 May 2023 in the sum of RM22,000 and a final payment of RM20,000 on 23 June 2025, which in total accounted to RM70,000.

[23] As a result of the defendant's failure to serve the interest and make the full repayment, the plaintiff initiated this suit for non-payment based on the loan agreement dated 6 May 2022.

ISSUES FOR DETERMINATION

[24] Arising from the aforesaid facts, the following issues fall for determination by this court:

(a) whether the plaintiff had charged interest above the permitted rate of 18%pa (1.5% per month) under s 17A(1) of the MLA and therefore rendering the moneylending agreement void and unenforceable; and

(b) whether s 27A of the MLA prohibiting the employment of an agent by a moneylender has been contravened.

COURT'S CONSIDERATIONS

[25] Section 17A(1) of the MLA which states as follows:

17A Interest for secured and unsecured loans

(1) For the purposes of this Act, the interest for a secured loan shall not exceed

twelve per centum per annum and the *interest for an unsecured loan shall not exceed eighteen per centum per annum.*

(2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a licensee of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees.

(3) Where in a moneylending agreement the *interest charged* for a secured loan or *an unsecured loan*, as the case may be, is more than that specified in subsection (1), *that agreement shall be void and have no effect and shall not be enforceable.*

[26] Of relevance is also s 2(g) of the Contracts Act 1950 which reads that 'an agreement not enforceable by law is said to be void'. Further reference is also made to s 24 of the Contracts Act 1950 which states that:

24 What considerations and objects are lawful, and what not

The consideration or object of an agreement is lawful, unless:

(a) It is forbidden by a law;

[27] As such, where the loan is unsecured, the prescribed interest rate under s 17A(1) of the MLA is 18%pa or 1.5% per month and any contravention of that section would render the loan agreement illegal, void ab initio and unenforceable.

[28] In this regard, this court finds that the plaintiff had, notwithstanding the express terms of the loan agreement dated 6 May 2022, indeed contravened s 17A(1) of the MLA. This is because in truth, the loan agreement was governed by the terms of the first oral agreement and the second oral agreement and not under the loan agreement dated 6 May 2022.

[29] Firstly, there is the collection of the post-dated cheques of RM122,500 each for the months of May 2022 to November 2022. The said sum of RM122,500 is equals to 3.5% interest per month on the loan sum of RM3.5m which clearly exceeds the maximum 18%pa permitted in s 17A(1) of the MLA. In fact, it amounts to a whopping 42%pa.

[30] Secondly, there is a further collection of the post-dated cheques of RM70,000 each for the months of December 2022 to April 2023. This amounts to 2% per month which is equivalent to 24%pa, which again exceeds the maximum 18%pa permitted. PW1, during his testimony expressly acknowledged the imposition of the 2% per month interest rate:

[17/10/2022, 11:46:04 PM] Finnex K1 Mr Chin: Messages and calls are end-to-end encrypted. No one outside of this chat, not even WhatsApp, can read or listen to them.

[17/10/2022, 11:46:04 PM] Datuk Haji Md Nizam: Hi Mr. Chng According to the latest phone conversation between you & me

– *We agreed that to maintain 2% interest p.m from 15th Dec 2022 onwards till we fully settle the principal amount,*

– also we would like to request a 12 months extension from 15 Dec 2022 till 15 Nov 2023 to partly settle any principal amount (with multiplier of RM 100k) within the extension period,

[31] The plaintiff's reliance on the terms of the loan agreement dated 6 May 2022 stipulating the interest as 18%pa is untenable given the fact that between the plaintiff and the defendant, they had regulated their relationship based on the first oral agreement and the second oral agreement instead of the terms set out in the loan agreement dated 6 May 2022. The explanation by PW1 that the payments made by the defendant from each of the post-dated cheques were utilised partly for the interest payment of 18%pa and partly for the principal loan sum is untenable and in fact against the weight of the evidence. This is because the defendant had issued a post-dated cheque for the final bullet payment of RM3.5m consistent with the terms of the first oral agreement and the second oral agreement. If indeed as testified by PW1, part of the payments under the earlier post-dated cheques were towards repayment of the capital loan sum, the post-dated cheque for the final bullet payment would not have been for the total loan sum of RM3.5m.

[32] Further, on 13 April 2023, DW1 had informed PW1 not to deposit the RM70,000 cheque due to insufficient funds. Nevertheless, PW1 deposited the cheque, which could not be cleared. In a WhatsApp message on 19 April 2023, PW1 expressed disappointment that 'the *interest* element cannot be serviced', confirming the payment of RM70,000 was actually interest:

[13/64/2023, 1:00:36 AM] Datuk Haji Md Nizam: Hi mr chin kindly let you know pls do not bank in the cqe on this 14th April due to insufficient fund we waiting for the loan disbursement so supposed by this week but the delayed by another tow week so you can bank in the cque by earlier of may first week

[19/04/2023, 9:58:52 AM] Finnex Kl Mr Chin: Dato ... Dialisis pd cheque due on 15.4.23 bounced I have to advise Mgt ... and matter will be handled by our legal division ... Most likely the letter to recall the loan will be out ... *I am really disappointed that the interest element cannot be serviced* ...

[33] In another WhatsApp exchange on 20 April 2023, DW1 stated that almost RM900,000 in interest had been paid at 3.0% (of which the defendant meant to say is 3.5% and not 3%) and later 2%. PW1 did not deny this and instead replied that the defendant had assured that interest would be paid as agreed:

A [20/04/2023, 12:10:03 AM] Datuk Haji Md Nizam: *Mr. Chin so for we serve the interest without any default for last one year, 6 month 3% fallowed by 2% interest still now. Almost 900k we severed interest alone. I am asking you to give some time to cleared the April interest and 1 had informed you earlier but you still bnk in the cque.*

We wll cleared the interest by earlier of may

B [20/04/2023, 12:16:13 AM] Datuk Haji Mu Nizam: To inform you I was to returned to you RM 1 million but Gallan not agreed also he promised will secured a bank facilities (loan) but he failed do that due to this circumstances we failed to settld your loan hope you understand help us to cleared you loan as a business you could understand our situation too. Tqvm

C [20/04/2023, 9:05:05 AM] Finnex Kl Mr Chin: Dato ... Morning ... *U and Francis have given Finnex the assurance that all interest will be paid on each day date and this assurance was conveyed to Mgt.*

D **[34]** Additional WhatsApp messages also show consistent references made by PW1 with regards to the RM70,000 payments as 'interest', without any correction or clarification to the contrary:

[12/06/2023, 12:33:51 PM] Finnex KI Mr Chin: Dato ... *The minimum that legal will insist on will be servicing of interest todate* ...

E [13/06/2023, 9:29:33 AM] Datuk Haji Md Nizam: Yes i am understand

[13/06/2023, 9:29:42 AM] Datuk Haji Md Nizam: Will workout on it

[13/06/2023, 9:50:01 AM] Finnex Kl Mr Chin: Dato ... Morning

F Noted with tks ... but interest servicing todate dateline by Legal is this coming Friday ...

[13/06/2023, 2:37:53 PM] Datuk Haji Md Nizam: We wll get our fund by next week only so by 28th I could settled the pending payment

G [13/06/2023, 3:17:10 PM] Finnex KI Mr Chin: Dato ... I will pass your message to Legal ...

By 28.6.23 ... Interest due..

1.20k (bal due on 15.4.23)

H *2.70k (due 15.5.23)*

3.70 (due 15.6.23)

Total 160k

I Legal now has the final say ... and comes 28.6.23 ... what amount will u commit so that i can also send the message to Legal ...

[22/06/2023, 9:36:30 AM] Finnex KI Mr Chin: Dato ... Morning ... On 28.6.23 ... *we look forward to the servicing/payment of all outstanding interest todate* ... Tq

[24/06/2023, 12:50:40 AM] Datuk Haji Md Nizam: Hi mr chin for the April pending payment we done rdy wll send the bank in slip tomorrow

[24/06/2023, 12:51:39 AM] Datuk Haji Md Nizam: And my earlier nxt month wll pay may and jun waiting for bank disbursement hope to get the fund soon

[24/06/2023, 12:52:13 AM] Datuk Haji Md Nizam: We are planing to pay some principal amount too

[24/06/2023, 10:37:19 PM] Finnex Kl Mr Chin: Your security code with Finnex KI Mr Chin changed. Tap to learn more.

[26/06/2023, 9:49:20 AM] Finnex Kl Mr Chin: Dato ... morning .... Our Legal asked me to check whether *all interest outstanding* will be fully settled on the 28.6.23? ...plse revert ... tq

[26/06/2023, 10:19:32 AM] Datuk Haji Md Nizam: Finnex RM20k. PDF • 1 page < attached: 00000119-Finnex RM20k. pdf>

[26/06/2023, 12:32:37 PM] Finnex Kl Mr Chin: Dato ... what about your earlier commitment of settling all outstanding interest by 28.6.23?

[35] Reference is also made to the further WhatsApp messages where PW1 have repetitively made demands of *interest* payment of RM70,000:

[26/06/2023, 2:46:37 PM] Finnex Kl Mr Chin: Dato ... our Legal has requested when the interest outstanding for May and Jun 23 will be paid ... their concern relates to your commitment to settle both by 28.6.23 ... plse advise as this matter is now handle by them and I need to let them know ... tq

[27/06/2023, 1:11:00 AM] Datuk Haji Md Nizam: As per I stated in the latest letter we need still little more time to get the bank, disbursement once we got the money

[06/07/2023, 2:31:21 PM] Finnex KI Mr Chin: Dato ... afternoon ... Come 15.7.23 ... the outstanding due ... interest are ...

1. May 23 ... 70000

2. Jun 23 ... 70000

3. July 23 ... 70000

Total ... 210000

With this non servicing (as promised by Dato many times) ... I am having pressure to hold back our Legal ... plse take note ...

110/07/2023, 10:15:07 AM] Datuk Haji Md Nizam: Noted mr. chin

[36] Accordingly, to my mind, the defendant has established on the balance of probabilities that the monthly payments of RM122,500 and thereafter RM70,000 were indeed interest payments and basing on the aforesaid, the rate of interest charged by the plaintiff in respect of the loan sum of RM3.5m were

at 42%pa and at 24%pa, respectively which contravened s 17A(1) of the MLA.

[37] The plaintiff had sought to rely on their accounting treatments of the payments received from the defendant as reflected in its borrower's ledger account to show that the interest rate charged to the defendant was purportedly 1.5% per month in accordance with the MLA. However, the court will readily look beyond the accounting entries if there are clear evidence that the entries were nothing more than devices to disguise or misrepresent the actual interest rate charged with the view to artificially comply with the provisions of the MLA. The plaintiff cannot willy-nilly or at its own choosing, reflect a random sum from the actual agreed amount paid by the defendant monthly as agreed interest in the ledger book which has no bearing to the first oral agreement and the second oral agreement. In fact, the entries were also inconsistent with the terms of the loan agreement dated 6 May 2022.

[38] Looking at the ledger book, even though the defendant had paid the sum of RM122,500 as the agreed interest payments for the months of May 2022 to November 2022, the plaintiff had reflected a sum of RM85,750 as the monthly sums received from May to September 2022 and the sum of RM42,875 as the monthly sums received for October and November 2022. This is puzzling since during PW1's testimony, he had confirmed that out of the RM122,500, a sum of RM70,000 was deducted to pay FG Capital and only RM52,500 was purportedly paid to the plaintiff as interest. Indeed, as alluded to earlier, these payments were also inconsistent with the particulars of the loan agreement dated 6 May 2022 that were recorded in the ledger book which expressly stated the monthly payments to be RM635,833.33.

[39] Equally inexplicable is PW1's testimony that FG Capital had paid a sum of RM33,250 to the plaintiff out of the RM70,000 that it received from the RM122,500 paid by the defendant, purportedly to account for the defendant's monthly capital repayment. There is no evidence that the defendant was even made aware of these 'monthly capital repayment'. Indeed, when the defendant and the plaintiff had agreed to the second oral agreement, the capital sum remaining due and owing was still RM3.5m without any deductions from the purported 'monthly capital repayment' by FG Capital.

[40] Quite plainly, the accounting treatments in the plaintiff's ledger account purporting to reflect the payments from the defendant under the loan agreement do not at all accord with the reality of the situation. To my mind, the figure of RM52,500 that was treated as the monthly interest payment by the plaintiff was to paint a picture that the rate of interest charged was 18%pa in compliance with the provisions of the MLA. In truth, the position between the plaintiff and the defendant was that the monthly interest payments under the first oral agreement were RM122,500 for the period from May 2022 to

November 2022. There was no repayment of the principal sum at all. This was the same when the subsequent sum of RM70,000 was agreed as the monthly interest payments for the period from December 2022 to April 2023 under the second oral agreement.

[41] Further, notwithstanding that the ledger account shows a reduction in the outstanding principal loan sum, the truth was as between the plaintiff and the defendant, the entire principle loan sum of RM3.5m was to be paid in one bullet payment and a post dated cheque for the said amount was indeed issued by the defendant.

[42] Accordingly, it is the judgment of this court that the plaintiff's ledger account was nothing more than a sham and for this reason, this court will not give any weight to the entries at all purporting to be a reflection of the arrangement between the plaintiff and the defendant based on the terms of the loan agreement dated 6 May 2022.

[43] In *Mahmood bin Ooyub v Li Chee Loong and another appeal* [2020] 6 MLJ 755, the Court of Appeal dealt with a case where there is a circumvention of MLA and held that such contravention also contravenes s 24 of the Contract Act 1950. More recently, in *Triple Zest Trading & Suppliers & Ors v Applied Business Technologies Sdn Bhd* [2023] 6 MLJ 818, the Federal Court decided as follows:

> (6) *The trite principle was that a loss should lie where it falls when an agreement was found to be illegal. The 'agreed profit' in the instant case was caught by paras (a), (b) and (e) of s 24 of the Contracts Act 1950 ('the CA') in that it was a 'consideration' that was forbidden by law, was of such a nature that, if permitted, would defeat any law and was one which the court regarded as immoral or opposed to public policy. The unlawfulness of the 'consideration' thus rendered the loan agreement in the instant case void under s 24 of the CA.*
>
> Reference is also made to the following paragraphs whereby the Federal Court had stated that by allowing the respondent to claim the principal back after charging exorbitant interest, would clearly make a mockery of the MLA as discussed below.
>
> ...
>
> [23] *We agree with learned counsel for the appellants that if the court were to lend a helping hand to a person who charges exorbitant interest to claim back the principal amount lent, it would create a fertile breeding ground for illegal moneylenders aka 'Ah Long' because in the event the borrower does not repay, the principal loan amount is guaranteed to be recoverable through the court process. Ah Longs would have nothing to lose. Their only loss, if at all it can be called a loss, is that they will not be able to enjoy the fruits of the exorbitant interest rates that they charged their borrowers, but that should matter little to them as they will get back their money in full.*
>
> [24] *In the present case, not only was the respondent not punished for contravening s 5(2)*

of the MA51 but it was in some way given a helping hand by the court, albeit unwittingly. Without being derogatory, the decision of the courts below can be likened to allowing a robber to claim back his cost and expenses in a botched robbery attempt.

[25] *It makes a mockery of MA51 and the Financial Services Act 2013. While banks and licenced moneylending companies need to obtain licences and abide by strict monetary regulations, unlicensed moneylenders need only to use the term 'agreed profit' in place of 'interest' as 'consideration' in carrying on their illegal moneylending activities.*

[26] *This not only goes against the object of MA51 which is for the 'regulation and control of the business of moneylending, the protection of borrowers of monies lent in such business, and matters connected therewith' (see the preamble to MA51) but is also against the trite principle that a loss lies where it falls when an agreement is found to be illegal.*

[44] On the basis of the aforesaid authorities and based on this court's finding of the actual interest rate charged, it is the judgment of this court that the loan agreement entered into between the plaintiff and the defendant was in fact based on the first oral agreement and the second oral agreement and were void and unenforceable being in contravention of s 17A(1) of the MLA.

Whether Gallen Lee is the plaintiff's agent and therefore had run afoul of the s 27A of the MLA

[45] Section 27A of the MLA reads as follows:

27A Prohibition of employing an agent or canvasser

(1) No moneylender shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender.

(2) No person shall act as agent or canvasser, or demand or receive directly or indirectly any sum or other value consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money.

(3) ...

[46] During examination-in-chief and cross-examination the plaintiff had admitted to the following facts:

(a) that the defendant was introduced to the plaintiff by Gallen Lee from FG Capital;

(b) that the defendant had no prior dealing with the plaintiff and that the defendant was not the only borrower that Gallen Lee had introduced to the plaintiff;

(c) that a sum of RM70,000 was deducted from the loan sum and paid to FG Capital as a 'processing fee' for arranging the loan; and

(d) that from the defendant's monthly interest payments for the period from May to December 2022, Gallen Lee had received a sum of RM37,750 as his 'processing fee' and had caused FG Capital to pay RM33,250 each month to the plaintiff purportedly to account for the defendant's monthly capital repayment.

[47] It is significant that the plaintiff did not procure Gallen Lee to attend court to testify on his roles in the loan that the defendant had obtained from the plaintiff and or the payments that were made to FG Capital from the defendant. Given the express pleaded claim by the defendant that Gallen Lee and or FG Capital was an agent of the plaintiff, the attendance of Gallen Lee at the trial and be subject to cross examination would have assisted the court to appreciate his true roles in the transaction between the plaintiff and the defendant. Indeed, no explanation has been proffered for Gallen Lee's non-attendance to testify.

[48] In this case, there is no evidence at all that the defendant and Gallen Lee and or FG Capital had any contractual relationship. Certainly, there is no evidence of any communications or discussions between the two as regards any fee and or commission that the defendant would be obliged to pay in the event that the defendant were to be successful in obtaining a loan from the plaintiff.

[49] Based on the undated letter of authorisation and letter of appointment issued by the defendant to the plaintiff and to Messrs Bishan & Partners respectively (which letters were prepared by the plaintiff for the defendant to issue), the sum of RM70,000 stated as 'processing fee' payable to FG Capital and the 'service charges' of RM70,000 stated as payable to FG Capital in the letter of authorisation and the letter of appointment respectively, were dictated by the plaintiff and not the defendant. In other words, the amounts to be paid to FG Capital were determined not by the defendant but by the plaintiff.

[50] Crucially, the sum of RM33,250 that FG Capital would deduct from its 'service charges' each month to pay the plaintiff purportedly toward capital repayment of the loan was also an arrangement that was made privately only between the plaintiff and Gallen Lee and or FG Capital without the defendant's knowledge at all.

[51] The aforesaid, to my mind, shows that Gallen Lee and or FG Capital was at all times acting as 'agent or canvasser' for the plaintiff and or at the very least had received directly or indirectly valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to the plaintiff the defendant to borrow money.

[52] In fact, the plaintiff did not deny that Gallen Lee was its agent when the defendant had described him as such. This is clear from the WhatsApp message on 20 September 2023 at 12:46:26:

> Md Nizam: Due to your agent mr Gallan we are lost quite lot of money ...

[53] Looking into all the facts above, this would clearly show that Gallen Lee had been canvassing the plaintiff's business to borrowers who are looking for loan and this is in clear contravention of s 27A(1) of the MLA and therefore rendering the loan agreement, be it under the loan agreement dated 6 May 2022, the first oral agreement and or the second oral agreement to be void and unenforceable against the defendant.

[54] By reason of the aforesaid, it is the judgment of this court that the plaintiff's claims against the defendant is dismissed.

THE DEFENDANT'S COUNTERCLAIM

[55] The defendant has brought a counter claim, inter alia, for the following reliefs:

(a) a declaration that the loan agreement dated 6 May 2022 is void ab initio, and unenforceable;

(b) aggravated damages and exemplary damages for breaching the money lending agreement and the MLA; and

(c) damages amounting to RM8,236,250 for loss of income, operational cost and expenditure for the defendant's business;

[56] Following my findings that the plaintiff has contravened ss 17A(1) and 27A of the MLA with the consequence of the loan agreement dated 6 May 2022, the first oral agreement and the second oral agreement being rendered void and unenforceable, the declaration sought is unnecessary.

[57] However, with regards to the claims for damages, be it general damages or aggravated or exemplary damages, the burden is in the defendant to prove the same.

[58] In this connection, it is my judgment that the defendant has failed to satisfy this court on the issue of causation. No one from the financial institutions was called to testify that the defendant's purported failure to obtain the facility from Orix Credit Malaysia Sdn Bhd for the amount RM990,000 or failure to obtain facility from SMFL Leasing (M) Sdn Bhd for the sum of RM1,036,250 and or that the withdrawal of the loan facility from MBSB Bank

for the amount of RM6.21m was due to the blacklisting of the defendant by CTOS.

[59] Neither was the claim for the loss amounting to RM8,236,250 for purportedly for loss of income, operational cost and expenditure for the defendant's business proven before this court.

[60] Accordingly, the defendant's counterclaim for damages is dismissed with costs.

CONCLUSIONS

[61] In the premises, it is hereby ordered as follows:

(a) the plaintiff's action against the defendant is dismissed and the defendant's counterclaim against the plaintiff is also dismissed; and

(b) the plaintiff is to pay the defendant costs fixed at RM85,000 subject to allocator.

[62] Before concluding, this court feels compelled to express its disquiet over certain aspects of the manner in which the loan transaction was structured and presented. The documentation and the channelling of the monies from the solicitors' firm to the plaintiff suggest more than a mere oversight — they give rise to the troubling inference that the solicitors acting for the plaintiff may have played an active role in crafting a scheme designed to obscure the true rate of interest and in so doing, to evade the clear provisions of the MLA.

[63] Whilst no conclusive finding is made in this regard and nor was this issue squarely before this court, the appearance of legal practitioners facilitating arrangements that border on regulatory evasion undermines both the letter and the spirit of the law. Officers of the court bear a professional and ethical duty not only to their client but to the administration of justice. Where legal advice is used as a shield to legitimise transactions that would otherwise fall afoul of statutory regulation, the integrity of the legal profession is called into question.

[64] It is hope that this case serves as a reminder that the court will not hesitate to look behind the form of transaction to examine the substance and that any attempt, however sophisticated, to mask non-compliance will not be countenanced.

A *Plaintiff's action and defendant's counterclaim dismissed with costs of RM85,000 (subject to allocator) to be paid by plaintiff to defendant.*

Reported by Dzulqarnain Ab Fatar

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